

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal –State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Valor Telecommunications of Texas, L.P.)	
Petition for Waiver of Section 54.305 of)	
the Commission’s Rules)	

**COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION**

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SUMMARY

The Cellular Telecommunications & Internet Association (“CTIA”) opposes the Petition for Waiver of Section 54.305 filed by Valor Telecommunications of Texas, L.P. (“Valor”). At a time when rural LECs are so concerned about the growth of the Universal Service Fund, Valor is requesting a *twelve-fold increase* in its subsidies. High-Cost fund disbursements to rural LECs have grown from approximately \$2.3 billion in 2000 to a projected \$3.2 billion in 2003. At the same time, however, wireless ETCs only received \$45 million in 2002 and, even using the most aggressive projections, will only receive \$102 million in High-Cost support in 2003. In fact, during the period from 1999 through 2002, *rural LECs received approximately \$138 in High-Cost funding for every dollar received by wireless ETCs.*

The Universal Service Fund was created to benefit rural and low-income consumers. In light of current concerns over growth of the High-Cost fund, and Valor’s failure to provide any basis for a waiver of Section 54.305, the Commission should reject Valor’s Petition.

Valor’s position that it is a rural telephone company is based entirely on its “self certification” that it is a rural telephone company under Section 153(137)(D) of the Communications Act. However, to be a rural telephone company under this provision, one *must* have provided telephone exchange service “on February 8, 1996.” In July 2000, Western Wireless Corporation filed a Petition challenging Valor’s self-certification, arguing that Valor was not formed until 1999, so it cannot possibly satisfy this statutory requirement. To date, this Petition has not been acted on. Accordingly, before the Commission even attempts to address Valor’s latest Petition, it should address the issue presented in the Western Wireless Petition – which has now been pending for almost three years.

Even assuming, however, that Valor qualifies as a rural telephone company, it has not met any of the criteria for obtaining a waiver of Section 54.305. Valor's request for increased subsidies is completely inconsistent with its earlier representations to both the Texas Public Utility Commission and the FCC. In addition, Valor has made no showing that an increase is necessary to complete service upgrades.

Valor's waiver request is also not supported by Commission precedent. The only other case where the Commission has approved a waiver of Section 54.305 – the *Mescalero Apache Telecom* case – involved special circumstances where a waiver would bring new service to customers on a reservation where only 42 percent of the reservation's population received telephone service. In fact, Valor's situation is almost completely analogous to the *Blackduck Telephone* case, where the Commission squarely rejected a request for waiver of Section 54.305.

Valor's request would also harm the overall public interest. If granted, Valor's request would eviscerate the clear intent of Section 54.305, and encourage a number of other parties to also seek waivers, thus further increasing the burden on the High-Cost fund. Accordingly, CTIA urges the Commission to deny Valor's request for a waiver of Section 54.305.

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The Cellular Telecommunications & Internet Association (“CTIA”) opposes the Petition for Waiver of Section 54.305 (“Petition”) filed by Valor Telecommunications of Texas, L.P. (“Valor”).¹ As CTIA further details below, at a time when rural LECs are so concerned about the growth of the high cost fund, Valor seeks a twelve-fold increase in the level of its USF subsidies. Valor has not met its heavy burden of demonstrating its entitlement to a waiver of the Commission’s rules.

I. BACKGROUND

Valor was formed in 1999 to enter the telecommunications business through the purchase of exchanges from incumbent local exchange carriers (“ILECs”).² Valor Telecom first entered the market in July 2000 when it purchased exchanges from GTE.³ In less than three years, Valor

¹ See *Public Notice*, “Wireline Competition Bureau Seeks Comment on Valor Telecommunications of Texas, L.P. Petition for Waiver of Section 54.305 of the Commission’s Rules,” CC Docket No. 96-45, DA 03-1458 (rel. April 30, 2003). See also Valor Telecommunications of Texas, L.P., Petition for Waiver of Section 54.305 (filed April 11, 2003)(“Valor Waiver Petition”).

² See Valor Comments, CC Docket No. 96-45, at 1 (filed Sept. 18, 2000).

³ According to Valor, it “commenced operations in Oklahoma on July 1, 2000, and in New Mexico and Texas on September 1, 2000.” Valor Comments, CC Docket No. 96-45, at 1 (filed Sept. 18, 2000).

has purchased additional exchanges, and is now “a mid-sized carrier,”⁴ serving “more than 550,000 lines” in four states (Oklahoma, New Mexico, Texas and Arkansas).⁵ Valor is now the 12th largest LEC in the country – larger than Alaska Communications and Iowa Network Services.⁶

In its Petition, Valor seeks a waiver of Section 54.305⁷ – which caps Universal Service support for exchanges that are acquired by unaffiliated carriers – so it can receive an additional \$10.2 million annually in USF subsidies.⁸ Valor states that it receives approximately \$852,000 a year in universal service fund (“USF”) support for its Texas operations.⁹ The Universal Service Fund Monitoring Report, however, indicates that Valor-Texas received over \$2.3 million in USF support during the first six months of 2002 alone.¹⁰ In addition, Valor-Texas now receives additional USF subsidies for the Kerrville exchanges it recently acquired.¹¹

⁴ Valor Waiver Petition at 1.

⁵ See Valor Comments, CC Docket No. 96-45, at 4 (filed April 14, 2002).

⁶ See Industry Analysis and Technology Division, *Trends in Telephone Service*, at 8-5, Table 8.3 (May 2002).

⁷ See 47 C.F.R. § 54.305.

A carrier that acquires telephone exchanges from an unaffiliated carrier shall receive universal service support for the acquired exchanges at the same per-line support levels for which those exchanges were eligible prior to the transfer of the exchanges.

Id. at § 54.305(a).

⁸ See Valor Waiver Petition at 15 (“Valor estimates that it will receive approximately \$850,000 in monthly support as a result of this waiver.”). This monthly sum equates to \$10,200,000 annually.

⁹ See *id.* at 1 (“Valor’s current universal service support levels [are] approximately \$71,000 per month in Texas.”). This monthly sum equates to \$852,000 annually.

¹⁰ See Universal Service Monitoring Report, at 3-158, Table 3.31 (Oct. 2002)(“Monitoring Report”).

¹¹ Kerrville received over \$1.8 million in USF support in 2001. See Monitoring Report at 3-159, Table 3.31.

Valor claims that its rate of return of “only” 6.7 percent in 2000, 5.7 percent in 2001 and 5.34 percent in 2002 requires the Commission to waive Section 54.305 because “prudence dictates that Valor must obtain additional external sources of funding to continue on the course of its current modernization program.” The Universal Service program was created to provide benefits to rural and low-income consumers, and not for the benefit of an entity seeking to increase corporate profits. In light of current concerns over the growth of the High-Cost fund, and Valor’s failure to provide any basis for a waiver of Section 54.305, the Commission should reject Valor’s Petition.

II. GRANT OF THE VALOR PETITION WOULD SUBSTANTIALLY UNDERMINE EFFORTS TO CONTROL HIGH-COST FUND GROWTH

CTIA is concerned that continued demands for increased levels of High-Cost funds by rural LECs – such as Valor – will undermine the stability of the High-Cost fund and damage the Commission’s efforts to ensure that High-Cost support is allocated in a competitively and technologically neutral manner. High-Cost fund disbursements to rural LECs have grown substantially in recent years. In 2000, rural LECs received approximately \$2.03 billion in High-Cost support.¹² By 2002, High-Cost support to rural LECs had ballooned to almost \$3 billion,¹³ and is projected to total approximately \$3.2 billion in 2003.¹⁴ Wireless ETCs, on the other hand, have received a much smaller portion of High-Cost funds. In 2002, wireless CETCs received only about \$45 million in High-Cost support and, even utilizing the most aggressive projections, will likely receive only \$102 million in High-Cost funding in 2003. In fact, during the period

¹² See *Monitoring Report* at 3-12, Table 3.1.

¹³ See *id.*

¹⁴ See Organization for the Promotion and Advancement of Small Telecommunications Companies, *UNIVERSAL SERVICE IN RURAL AMERICA: A CONGRESSIONAL MANDATE AT RISK* (January 2003) (hereinafter “OPASTCO Study”), at A-3, A-4.

from 1999 through 2002, *rural LECs received approximately \$138 in High-Cost funding for every dollar received by wireless ETCs.*¹⁵

Grant of the Valor Petition would add another \$10 million annual funding obligation to the High-Cost fund – *more than twelve times* the amount that Valor currently claims to receive in High-Cost distributions. The Commission adopted Section 54.305 in 1997, in part, to “discourage carriers from placing unreasonable reliance on universal service support in deciding whether to purchase exchanges from other carriers.”¹⁶ Approval of Valor’s waiver, however, would completely undermine the original purpose of the rule, and will inevitably encourage efforts by other parties to obtain waivers. Taken collectively, these waivers would have a substantial impact on the High-Cost fund, and would almost certainly undermine both the financial stability of the High-Cost fund and the Commission’s efforts to ensure that High-Cost funds are allocated on a technologically neutral basis.

III. THE COMMISSION CANNOT ADDRESS VALOR’S WAIVER PETITION UNTIL IT RESOLVES THE WESTERN WIRELESS PETITION TO REJECT THAT WAS FILED THREE YEARS AGO

As noted above, Valor seeks a waiver of Section 54.305 so it can receive additional USF subsidies – over \$10 million annually – that it claims will place it “on an equal footing with other

¹⁵ This figure is derived by taking the total amount of High-Cost support from 1999 through 2002 (approximately \$9,483,042,486), subtracting wireless CETC disbursements, wireline CETC distributions and nonrural High-Cost support, and then dividing the remainder by total wireless CETC disbursements (approximately \$62,931,135). *See* Universal Service Monitoring Report at Table 3.13 (detailing total High-Cost support for years 1999 through 2001); Universal Service Administrative Company, Federal Universal Service Support Mechanisms Fund Size Projections for the Second Quarter 2003 (filed Jan. 31, 2003) (detailing total 2002 High-Cost support); OPASTCO Study at A-4 (detailing wireline CETC funding); USAC Wireless CETC Support Summary at 2 (detailing wireless CETC support for years 1999 through 2002).

¹⁶ *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8942-43, ¶ 308 (1997) (hereinafter “First Universal Service Order”).

rural carriers.”¹⁷ The fundamental premise underlying Valor’s current waiver petition is that it is a rural telephone company and, as a result, should be able to receive USF subsidies like other rural telephone companies. On the other hand, if Valor is not a rural telephone company, there would be no reason for the Commission to act on Valor’s waiver petition because Valor would be unable to receive the additional subsidies it seeks by its petition.

Valor’s position that it is a rural telephone company is based entirely on its “self certification” that it is a rural telephone company under Section 153(37)(D) of the Act,¹⁸ which requires that a LEC have “less than 15 percent of its access lines in communities of more than 50,000 on February 8, 1996.”¹⁹ Western Wireless Corporation (“Western Wireless”) challenged Valor’s “self certification” nearly three years ago, in July 2000.²⁰ The requirements of Section 153(37)(D) are clear and unequivocal. To be a rural telephone company under this particular provision, one must have provided telephone exchange services “on February 8, 1996.” Valor was not formed until 1999 and did not commence operations until 2000, so it cannot possibly satisfy this statutory requirement. The Commission cannot grant the relief Valor seeks – a sizable increase of USF support under the rural USF program – without first addressing the threshold question whether Valor is even a rural telephone company under the Act.

¹⁷ Valor Waiver Petition at 3.

¹⁸ See Letter from Mr. Jerry M. Allen, Valor Vice President-Accounting and Finance, to Ms. Sheryl Todd, FCC Accounting and Audits Division, at 1 (filed June 27, 2000)(“Valor meets the criteria set forth in Section 3(37)(D) of the Communications Act.”)(“Valor Self-Certification Letter”).

¹⁹ 47 U.S.C. § 153(37)(D).

²⁰ See Western Wireless Petition to Reject, CC Docket No. 96-45 (filed July 27, 2000)(“Western Petition to Reject”). See also *Public Notice, Common Carrier Bureau Seeks Comment on Western Wireless Corporation Petition to Reject Rural Telephone Company Self-Certification Filed by Valor Telecommunications Southwest, LLC*, CC Docket No. 96-45, DA 00-1882 (Aug. 17, 2000).

IV. VALOR HAS NOT MET ITS HEAVY BURDEN OF ESTABLISHING ENTITLEMENT TO A RULE WAIVER – EVEN ASSUMING IT IS A RURAL LEC

The Commission has emphasized that companies like Valor seeking “a waiver of section 54.305 will bear a heavy burden.”²¹ In particular, the Commission has held that a waiver of Section 54.305 may be appropriate “only if [1] special circumstances warrant a deviation from the general rule and [2] such deviation will serve the public interest.”²² Of course, “[t]he very essence of waiver is the assumed validity of the general rule.”²³ As detailed below, Valor’s waiver petition does not begin to meet these rigorous requirements.

A. Valor’s Request for Increased Subsidies Is Inconsistent With Its Prior Representations and Commitments

Valor claims it needs increased USF subsidies to complete its five-year modernization program in Texas.²⁴ However, Valor told the Commission before it acquired the GTE properties that it “*will* provide additional and improved services” and that the residents of the GTE exchanges “*will* . . . receive state of-the-art service that is affordable and responsible to the needs of rural and low-density communities.”²⁵ Valor further told the Commission that there “will be no

²¹ *Mescalero Apache Telecom, Inc.; Waiver of Section 54.305 of the Commission’s Rules, Order*, 16 FCC Rcd 1312, 1320 ¶ 13 (2001) (hereinafter “Mescalero Apache Telecom”).

²² *Id.* at 1316 ¶ 6 (emphasis added). *See also Valor Telecommunications of Texas, LP and GTE Southwest Incorporated; Joint Petition for Waiver of the Definition of “Study Area” Contained in part 36 Appendix-Glossary of the Commission’s Rules, Order*, 15 FCC Rcd 15816, 15819-20 ¶ 8 (2000).

²³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969). *See also Mescalero Apache Telecom*, 16 FCC Rcd at 1315 ¶ 6 (“[A]gency rules are presume valid.”). Courts have recognized that the FCC “has broad discretion to deny waivers.” *A/B Financial v. FCC*, No. 95-1027, 1995 U.S. App. LEXIS 37378, at 5 (D.C. Cir. 1995). Courts will reverse a waiver denial only if the FCC’s reasons are “so insubstantial as to render that denial an abuse of discretion.” *Melcher v. FCC*, 134 F.3d 1143, 1163 (D.C. Cir. 1998).

²⁴ *See* Valor Waiver Petition at 9-10.

²⁵ Valor-Texas Petition for Study Area Waiver, CC Docket No. 96-45, at 7 (filed April 24, 2000)(emphasis added).

USF impact” resulting from its modernization plan because of the caps imposed by Section 54.305.²⁶

Valor also told the Texas Commission that it would invest \$287 million as part of its five-year modernization program.²⁷ Valor has spent to date only \$100.2 million of this sum.²⁸ Given its prior representation that its acquisition and operation of the GTE Texas exchanges would have “no USF impact,” Valor should be precluded from seeking any additional USF.

B. Valor Has Not Documented That It Needs Any Increased Subsidies

Valor’s five-year modernization program in Texas involves the investment of \$287 million. The Texas Commission found that Valor’s “institutional investors have committed to invest . . . in excess of \$535 million” and that Valor has secured additional “debt financing of \$1.175 billion.”²⁹ Valor and its institutional investors may consider annual returns of 5.3 to 6.7 percent³⁰ as “anemic,”³¹ although this view certainly would not be shared by most ordinary investors given today’s economy.³² Even ignoring its prior representations, Valor does not need increased USF subsidies in order to complete its modernization program.

²⁶ See *id.* at 5-6 (emphasis added).

²⁷ See Valor-Texas Approval Order at ¶ 41(a).

²⁸ See Valor Waiver Petition at 9.

²⁹ Valor-Texas Approval Order at ¶¶ 20 and 24.

³⁰ See Valor Waiver Petition at 11.

³¹ See Valor Petition for Waiver of the 2003 X-Factor Reductions Under Section 61.45(b)(1)(i) of the Commission’s Rules, at 2 (filed April 14, 2003).

³² See, e.g., *Wary Fed Sees Weakness As a Threat, Not Inflation*, WALL ST. J. (May 6, 2003) (Federal Reserve Bank leaves the federal-funds rate unchanged at 1.25%).

C. Valor's Petition Is Not Supported by Precedent as It Claims

Valor asserts that its requested waiver of Section 54.305 is “consistent with Commission precedent.”³³ Valor is mistaken -- to the contrary, its request is not consistent with prior Commission orders considering requests for waiver of Section 54.305.

The Commission has considered only two requests to waive Section 54.305. In *Mescalero Apache Telecom*,³⁴ it granted a waiver of Section 54.305 to a newly formed tribally-owned carrier that had purchased 950 lines from Valor. The Commission found that the petitioner had demonstrated “special circumstances [that] warrant a deviation from our general rule” because the network that Valor had sold reached only 42 percent of the reservation’s population and increased USF subsidies would enable the petitioner to bring “basic service to all unserved residences on the Reservation in its first two years of operation.”³⁵ In this regard, the Commission observed there existed on this particular reservation an “acute shortage of telecommunications services” that is “unusually severe,”³⁶ and it further noted the petitioner’s commitment that it would not impose line extension charges on its customers.³⁷ The Commission cautioned in granting this relief that it will “not, however, routinely grant waiver of this rule and those seeking a waiver of section 54.305 will bear a heavy burden.”³⁸

Two points bear emphasis concerning the *Mescalero Apache Order*. First, the Commission granted waiver relief *before* it modified Section 54.305 to establish a safety valve

³³ Valor Waiver Petition at 1 and 3-7.

³⁴ 16 FCC Rcd 1312 (2001).

³⁵ *Id.* at 1316 ¶¶ 1 and 7. The FCC further emphasized that grant of the waiver would ensure that “the Mescalero Apache Tribe will gain control over the deployment and provision of telecommunications on the Reservation, thereby furthering tribal self-government and self-determination.” *Id.* at 1317 ¶ 8.

³⁶ *Id.* at 1317 ¶ 9.

³⁷ *See id.* at 1317 ¶ 8.

³⁸ *Id.* at 1320 ¶ 13.

mechanism that enables USF recipients to obtain higher subsidies for increased investment.³⁹

Thus, without the waiver, it appeared at the time that Mescalero Apache Telecom would have been unable to receive any increased support for any post-transaction investments. Second, the tribal company estimated that its costs to build new facilities to unserved areas would exceed \$2,100 – or over six times the cost Valor states it incurs to serve its existing lines.⁴⁰

The *Mescalero Apache Order* has no relevance to Valor’s pending waiver request. Valor does not seek increased USF subsidy dollars so it can extend the reach of its network and serve areas that have no telephone service today. Rather, Valor seeks USF subsidy dollars to serve *existing* lines – and fewer lines than it served only 16 months ago because it has apparently been losing customers.⁴¹ Also, as discussed below, the Commission has addressed Valor’s concerns over future investment by the safety valve mechanism in Section 54.305 -- a mechanism that was not available to Mescalero Apache Telecom.

The Commission denied the second Section 54.305 waiver request.⁴² In that proceeding, Blackduck Telephone purchased lines from another rural telephone company, and it sought a waiver of Section 54.305 so it could receive an additional \$62,000 annually in USF support.⁴³ The Commission denied this request because it had specifically amended Section 54.305 to address “concerns that limits on high-cost support for acquired exchanges in section 54.305 may

³⁹ See *Federal-State Joint Board on Universal Service, Blackduck Telephone Company and Arvig Telephone Company, Joint Petition for Waiver of the Definition of “Study Area” Contained in the Part 36, Appendix-Glossary of the Commission’s Rules and Related Waiver of Section 54.305 of the Commission’s Rules, Order*, 17 FCC Rcd 24602, n.41 (2002) (hereinafter “Blackduck Telephone”).

⁴⁰ Compare *Mescalero Apache Telecom*, 16 FCC Rcd at 1318 ¶ 9 with Valor Waiver Petition at 1.

⁴¹ See Valor-Texas Petition for Waiver of the 2003 X-Factor Reductions Under Section 61.45(B)(1)(I), at 5 (filed April 14, 2002)(Valor states it served fewer lines at the end of 2002 than at the beginning of the year).

⁴² See *Blackduck Telephone*, 17 FCC Rcd at 24602 (2002).

⁴³ See *id.* at ¶ 4.

discourage rural carriers from acquiring high-cost exchanges from carriers with low average costs and may prevent rural carriers from receiving support for new investments in recently-acquired high-cost exchanges”:

These are the very concerns raised by Blackduck in its waiver petition. The Commission concluded that safety valve support would provide appropriate incentives for rural carriers, such as Blackduck, that will be operating recently-acquired exchanges, to invest in rural infrastructure. If, as predicted, Blackduck makes significant new investments in the acquired access lines, it may become eligible for additional safety valve support.⁴⁴

Valor’s situation is indistinguishable from that considered in the *Blackduck Order*. Valor contends it “may” need increased subsidies “to maintain quality, affordable local service” and to “moderniz[e] its infrastructure.”⁴⁵ But as the Commission noted in denying a waiver to Blackduck, Section 54.305 already accommodates Valor’s concerns because the safety valve mechanism permits USF recipients to receive “additional support for new investments in acquired exchanges.”⁴⁶ In addition, Valor can also receive support from the new Interstate Access Universal Service support fund.⁴⁷

Valor instead relies on *Accent Communications*,⁴⁸ a case that did not even involve Section 54.305. At issue in *Accent* were caps that the Common Carrier Bureau imposed on high-cost support for certain acquired exchanges *before* Section 54.305 was adopted. Under this Bureau practice, USF support could “not exceed the amounts specified in the carrier’s waiver petition.”⁴⁹ The Bureau adopted this practice to prevent carriers from engaging in “bait and switch” tactics –

⁴⁴ *Id.* at ¶ 13.

⁴⁵ Valor Waiver Petition at 1 and 10.

⁴⁶ *Blackduck Telephone* at ¶¶ 3 and 8.

⁴⁷ *See id.* at ¶¶ 3 and 9.

⁴⁸ *Petitions for Waiver Concerning the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules, Order*, 15 FCC Rcd 23491 (2000) (hereinafter “*Accent*” or “*Accent Communications*”).

namely, low balling anticipated USF support in order to help secure Commission approval and then later increasing the support.⁵⁰ In *Accent*, the Bureau lifted all of the caps it had imposed prior to the adoption of Section 54.305 on the ground that, with the passage of time, the caps had “served their purpose by preventing the carriers from underestimating the effect the transfer of exchanges would have on the high-cost loop support mechanism immediately following the transfer”:

[L]imiting the petitioners to the high-cost loop support estimated in their original study area waiver petitions, in perpetuity, is not necessary to accomplish the policies outline above. We note that the caps imposed on petitioner’s high-cost loop support have been in effect for over three years.⁵¹

Valor reads *Accent* for the proposition that the Commission “has recognized . . . that capping support for “a *limited* time is sufficient to accomplish the goals of Section 54.305.”⁵² The *Accent Order* cannot possibly be read in this manner given that the Bureau orders imposing the caps were entered “prior to the enactment of section 54.305,” and the *Accent Order* did not discuss (much less waive) Section 54.305.⁵³ The Bureau did determine that the objectives it sought to achieve by the pre-section 54.305 caps it imposed on “a case by case basis” had served their purpose after three years.⁵⁴ But the Commission has already recognized that the *different* cap established by Section 54.305 is designed to apply “indefinitely”:

[S]ection 54.305 provide[s] that a carrier acquiring exchanges from an unaffiliated carrier would indefinitely be limited to the same per-line levels of

⁴⁹ *Id.* at 23496-97 ¶ 6.

⁵⁰ *See id.*

⁵¹ *Id.* at 23499 ¶ 9.

⁵² Valor Waiver Petition at 5 (emphasis in original).

⁵³ *Ibid.*

⁵⁴ *Id.* at 4.

high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.⁵⁵

Completely baseless is Valor's suggestion that the Commission has "recognized that three years" is "sufficient to accomplish the goals of Section 54.305."⁵⁶ The Commission did not adopt a three-year sunset rule when it promulgated Section 54.305. To the contrary, it made abundantly clear that Section 54.305 should remain in place "until support for all carriers is based on a forward-looking economic costs methodology."⁵⁷

Valor's further assertion that the Commission has "recognized that caps of unlimited duration could hinder the carriers' incentive and ability to extend service to previously unserved areas" is likewise unavailing.⁵⁸ It must be remembered that the caps the Bureau imposed (and later lifted) were permanently frozen; a USF recipient could not obtain any additional subsidies without obtaining prior Commission approval. The Commission, recognizing that permanent caps could harm investment, therefore lifted the caps that the Bureau had imposed years earlier. It also (in a separate proceeding) modified Section 54.305 to include a "safety valve" mechanism with the explicit purpose of providing "additional support" to carriers subject to the Section 54.305 caps that make "post-transaction investments to enhance network infrastructure."⁵⁹ The Commission therefore incorporated into Section 54.305 the flexibility to receive increased subsidies for post-transaction investment that was not available to the ILECs whose USF support the Bureau had capped. There is, therefore, no basis to Valor's unsupported assertions that

⁵⁵ *Blackduck Telephone*, 17 FCC Rcd 24602 ¶ 13 (2002).

⁵⁶ Valor Waiver Petition at 5.

⁵⁷ *Federal-State Joint Board on Universal Service, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 0-256*, 16 FCC Rcd 11244, 11281 ¶ 91 (2001) (hereinafter "Fourteenth Universal Service Order").

⁵⁸ Valor Waiver Petition at 5.

⁵⁹ *Fourteenth Universal Service Order*, 16 FCC Rcd 11244, 11284 ¶ 97 (2001).

continuing the Section 54.305 regime on it “will significantly hinder Valor’s ‘incentive and ability’ to ‘upgrade service to [its] existing customers.’”⁶⁰ The Commission has adopted specific measures to address post-transaction investments for carriers subject to Section 54.305, and Valor supported these measures.⁶¹

Valor also suggests that the denial of its requested relief would be discriminatory: “Valor simply seeks to be put on an equal footing with other rural carriers and to receive support based on the actual cost of its lines.”⁶² There is no discrimination. First of all, following adoption of Section 54.305, all purchasers of exchanges are treated alike. Nor is there discrimination between LECs subject to the rule and LECs not subject to the rule because Section 54.305 applies only to those LECs that choose to purchase exchanges from other LECs. As the Commission has previously ruled in rejecting this very discrimination claim, grant of a waiver to carriers like Valor would provide “an unfair advantage over all [other] carriers”.⁶³

Because high cost loop support depends on study area average loop cost, upgrading the exchanges after they have been transferred will result in a higher level of high cost support than would occur if the upgrading had been performed instead by the sellers. As a result, those transactions tend to have a negative effect on the support available to other recipients pursuant to the overall indexed cap on the high cost mechanism.⁶⁴

There is, in summary, no basis to Valor’s argument that its request for relief is consistent with precedent and that denial of relief would somehow be discriminatory.

⁶⁰ Valor Waiver Petition at 6.

⁶¹ See, e.g., Valor Ex Parte, CC Docket No. 96-45 (filed May 1, 2001); Valor Reply Comments, CC Docket No. 96-45 (filed Feb. 1, 2001); Valor Comments, CC Docket No. 96-45 (filed Nov. 3, 2000).

⁶² Valor Waiver Petition at 7.

⁶³ *Accent Communications*, 15 FCC Rcd at 23501 ¶ 13 (2000).

⁶⁴ *Petition for Waiver and Reconsideration Concerning Sections 36.611, 36.612, 61.41(c)(2), 69.605(c), 69.3(e)(11) and the Definition of “Study Area” Contained in Part 36 Appendix-Glossary of the Commission’s Rules filed by Copper Valley Telephone, et al., Memorandum Opinion and Order on*

D. Valor's Claimed "Unique Circumstances" Are Not Special At All

Valor claims it faces a "combination of unique circumstances that make removal of its universal service cap particularly urgent."⁶⁵ In fact, the circumstances that Valor recites are not unique at all.

Valor first contends that the network it acquired from GTE is antiquated and "highly depreciated."⁶⁶ Valor, however, was well aware of the state of the network it purchased from GTE, and it decided the purchase these "highly depreciated" exchanges even though it knew that Section 54.305 could cap its USF support. Valor further told the Commission before its study area waiver was approved that its "business plan calls for significant upgrades to and modernization of the operations it will acquire."⁶⁷ Not once did Valor ever suggest that its modernization plans would depend on receipt of a rule waiver and increased USF subsidies.

Valor next contends that it has "higher costs per-line than other price cap LECs of comparable size."⁶⁸ But Valor purchased its exchanges with full knowledge that they are high-cost exchanges, and it decided to consummate the purchase (and pay a premium price for such a "highly depreciated" network) even though it was aware that it would be subject to the limits imposed by Section 54.305.

Valor next asserts that it has incurred "substantial capital expenditures" due to circumstances "beyond its control."⁶⁹ However, a review of the circumstances that Valor recites

Reconsideration, 1999 FCC LEXIS 4381, at ¶ 13 (rel. Sept. 9, 1999) (hereinafter "Copper Valley Waiver Order").

⁶⁵ Valor Waiver Petition at 8.

⁶⁶ *See id.* at 8-10.

⁶⁷ Valor Comments, CC Docket No. 94-1, at 2 (filed April 4, 2000).

⁶⁸ *Id.* at 10.

⁶⁹ *Id.* at 10-12.

demonstrates they were due not to circumstances “beyond its control,” but to the fact that it conducted an incomplete or inadequate due diligence, including the purchase of remote switches when the seller kept the host switch, allegedly having “incomplete cost information,” and allegedly not knowing that the seller, a publicly held company, recognized pension plan gains in 1999. As the Commission has observed in a related context, these types of circumstances are not grounds for a waiver because they “could have been discovered through due diligence and investigation before the exchanges were acquired.”⁷⁰

However, even if one accepts Valor’s assertion that these events were unforeseen and “beyond its control,” the fact remains that Valor, as a startup company, has been profitable each year that it has been in operations.⁷¹ Valor’s investors may be unhappy with the 5+ percent return they have enjoyed since commencing operations, but their inability to generate even higher profits – particularly given today’s economy – hardly constitutes a special circumstance warranting a rule waiver.

Valor finally asserts that safety valve support will “not accurately reflect the level of investment required to modernize” the network it purchased.⁷² Valor actively supported modification of Section 54.305 to include a safety valve mechanism for post-transaction investments, although in passing it expressed concern that the specific proposal on the table (and which the Commission adopted) “may not allow adequate recovery of new investments.”⁷³ Although Valor suggested that proposed limits on safety valve support be “evaluate[d]” as to

⁷⁰ *Copper Valley Waiver Order*, 1999 FCC LEXIS 4381, at ¶ 14.

⁷¹ *See id.* at 11.

⁷² *Id.* at 12-13.

⁷³ Valor Comments, CC Docket No. 96-45, at 4 (filed Nov. 3, 2000). *See also* Valor Ex Parte, CC Docket No. 96-45 (filed May 1, 2001)(Valor describes safety valve proposal that FCC adopted later that month as “important.”).

whether they are “consistent with the requirement of ensuring adequate universal service support for rural areas,”⁷⁴ it did not submit a specific counterproposal for public comment and Commission consideration. Not surprisingly, the Joint Board recommended and the Commission adopted the proposal that was endorsed by the Rural Task Force.

E. Grant of a Waiver Will Not Better Serve the Public Interest

Valor asserts that grant of a waiver of Rule 54.305 “will serve the public interest”:

Waiver of Section 54.305 will provide much-needed funds to allow Valor to improve the quality of access services for all of its customers and create a network that is capable of accommodating broadband services to consumers in the most rural parts of its service territory.⁷⁵

It bears noting that Valor has misstated the public interest standard as applied in waiver proceedings. The issue is not whether a waiver would “serve” the public interest; rather, appellate courts have held that the Commission must find that “strict compliance” with the rule would be “inconsistent with the public interest” and that the “agency must explain why deviation *better* serves the public interest.”⁷⁶ Valor does not begin to meet this standard.

It is not apparent why residential and business interstate users should fund the completion of Valor’s five-year modernization plan. Although a startup company, Valor has generated healthy profits exceeding five percent in each year of its operations – *without the additional federal subsidies it seeks*.⁷⁷ Valor’s institutional investors have already “committed to invest . . .

⁷⁴ Valor Comments, CC Docket No. 96-45, at 4 (filed Nov. 3, 2000).

⁷⁵ Valor Waiver Petition at 1 and 13.

⁷⁶ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (emphasis added).

⁷⁷ See Valor Waiver Petition at 11.

in excess of \$635 million,” which is more than double the amount needed for its five-year Texas modernization program.⁷⁸

Valor says it would use the \$10 million annually in USF subsidies to “create a network that is capable of accommodating broadband services to consumers in the most rural parts of its service territory,” although it further concedes that “the high-cost loop support mechanism does not support the provision of advanced services.”⁷⁹ Valor’s investors certainly have the right to make such investments, but Valor has not provided a single reason why interstate users outside of Texas (including low-income consumers) should be required to fund the build out of advanced services that are not supported by the current Universal Service fund.

F. Grant of a Waiver to Valor Would Eviscerate Rule 54.305

It is axiomatic that the Commission “must not eviscerate a rule by a waiver.”⁸⁰ In addition, the Commission may grant a waiver only if it is based on “articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application”.⁸¹

The agency must . . . articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.⁸²

Grant of a waiver to Valor would have the practical effect of eviscerating Section 54.305.

⁷⁸ See Valor-Texas Approval Order at ¶¶ 20 and 41(a).

⁷⁹ *Id.* at 13-14.

⁸⁰ See *DataRadio Corporation; Emergency Petition for Waiver of Section 90.547 of the Commission’s Rules, Order*, 15 FCC Rcd 22283, 22288 (2000). See generally *WAIT Radio*, 418 F.2d at 1159 (Waiver procedure “emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace; Leaco Rural Telephone Cooperative, Inc. Petition for Waiver, Second Order on Reconsideration and Memorandum Opinion and Order*, 14 FCC Rcd 10771, 10896 (1999)(Waiver must “not be so broad as to eviscerate the rule.”).

⁸¹ *WirelessCo, L.P., Phillieco, L.P. and Sprint Corporation for Limited Waiver of Section 24.204 of the Commission’s Rules*, 10 FCC Rcd 11111, 11114 ¶ 17 (1995).

⁸² *Northeast Cellular*, 987 F.2d at 1166.

The Commission made clear in adopting Section 54.305 its intention that the Rule would remain in effect “until support for all carriers is based on a forward-looking economic costs methodology.”⁸³ Valor now asks that the Rule be waived because it has been subject to the Rule for three years, which, Valor claims, is sufficient time to ensure that the Rule “has served its purpose.”⁸⁴

If the Commission grants a waiver to Valor, it must be prepared to grant the same waiver to every other carrier that is (or becomes) subject to Section 54.305. This is because the Commission would have established the principle that the Rule has “served its purpose” for these other carriers as well after three years. For all practical purposes, Valor seeks to modify Section 54.305 to incorporate a three-year sunset provision – something the Commission may not do outside a rulemaking proceeding.

The three-year sunset provision that Valor advocates would undermine the objectives the Commission sought to achieve in adopting Section 54.305. The sales prices of exchanges would reflect the likelihood that the buyer’s would begin receiving full USF support after three years. In addition, buyers would further have the incentive to delay investment in the exchanges they purchase until they become eligible for full USF support.

For all practical purposes, grant of a waiver to Valor would eviscerate Section 54.305. This is a course of action the Commission may not take in a waiver proceeding.

V. THE “ONE PERCENT” RULE IS NOT RELEVANT TO VALOR’S PETITION AND IN ANY EVENT, SHOULD NO LONGER BE UTILIZED

As Valor correctly notes, “[p]rior to the enactment of section 54.305, the Commission used a ‘one-percent’ guideline to determine whether a transfer of exchanges would have an

⁸³ 、 *Fourteenth Universal Service Order*, 16 FCC Rcd 11244, 11281 ¶ 91 (2001).

⁸⁴ Valor Wavier Petition at 6.

adverse impact on the universal service support mechanisms.”⁸⁵ Valor argues that its requested relief – increased USF subsidies of over \$10 million annually – is “less than one percent of the high-cost loop support fund” and that as a result, grant of its waiver request would “not constitute a significant impact on the universal service fund or result in unwarranted growth of the universal service fund.”⁸⁶

The so-called “one percent” guideline, which the Commission developed in the context of the sale of exchanges, has no relevance to waivers of Section 54.305. As discussed above, the Commission denied a waiver of Section 54.305 in *Blackduck Telephone*,⁸⁷ even though the requested increase in support was miniscule (\$61,689 annually vs. the \$10+ million annually sought by Valor).

Moreover, the “one-percent” guideline should no longer be used even if it were relevant to Section 54.305 waiver requests. When the Commission adopted this guideline, the size of the USF fund was \$725 million, so one percent constituted 7.25 million.⁸⁸ But as the Commission noted earlier this year, the high-cost fund for the year 2003 is “projected to be \$3.3 billion dollars, one percent of which would be \$33 million.”⁸⁹

⁸⁵ Valor Waiver Petition at 16.

⁸⁶ *Id.* at 15-16.

⁸⁷ 17 FCC Rcd at 24602.

⁸⁸ See *U S WEST Communications, Inc. and Eagle Telecommunications, Inc., Joint Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary of the Commission’s Rules and Eagle Telecommunications, Inc. Petition for Waiver of Section 61.41(c) of the Commission’s Rules, Memorandum Opinion and Order*, 10 FCC Rcd 1771, 1773 ¶ 11 (1995).

⁸⁹ *Nemont Telephone Cooperative, Inc., Missouri Valley Communications, Inc., Reservation Telephone Cooperative and Citizens Telecommunications Company of North Dakota; Joint Petition for Waiver of the Study Area Boundary Freeze Codified in the Part 36, Appendix-Glossary of the Commission’s Rules; Petition for Waiver of Sections 61.41(c)(2), 69.3(e)(11) and 69.605(c) of the Commission’s Rules, Order*, 18 FCC Rcd 838, at ¶ 11 (2003).

As noted earlier, Valor is the nation's 12th largest LEC, and it seeks a twelve-fold increase in the level of USF subsidies. Yet an increase of this magnitude for a carrier of this size constitutes less than one-third of the one-percent guideline. CTIA submits that the one-percent guideline is meaningless since few, if any, transactions would ever exceed this guideline.

CONCLUSION

For the aforementioned reasons, CTIA urges the Commission to deny Valor's Petition for Waiver of Section 54.305.

Respectfully submitted,

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